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Before the
Federal Communications Commission
Washington, D.C. 20554

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In re Applications of

DARRELL BRYAN

SBH PROPERTIES, INC.

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MM Docket No. 93-241

File No. BPH-920109MA

File No. BPH-920123MD

For Construction Permit for
New FM Channel 276A
Tusculum, Tennessee

To: Honorable John M. Frysiak
Administrative Law Judge

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REPLY TO
PROPOSED FINDINGS OF DARRELL BRYAN ON FINANCIAL ISSUES

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October 17, 1994

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SUMMARY

Bryan's Proposed Findings and Conclusions may not be relied upon, inasmuch as they are unsupported by the record, ignore relevant evidence and, most importantly, ignore the Commission's current financial certification requirements, which require contemporaneous documentation on hand at the time of filing verify the applicant's cost estimates and funding sources.

Based on the record developed in this proceeding, it must be concluded Bryan has failed to meet his burden of meeting the Commission's documentation requirements with regard to demonstrating financial qualifications. Furthermore, he significantly understated his costs of construction and initial operation by: relying on used equipment, omitting operating costs, omitting equipment and related items, omitting the cost of purchasing his transmitter site, underestimating the legal and engineering costs of prosecution, failing to budget for a intermediate receive/transmit point for his proposed microwave STL system, and by failing to secure a documented commitment to cover any shortfall resulting from the sale of WSMG. In addition, He also understated his costs by relying on his ability to use equipment on hand, but of uncertain availability. However, if all of the costs of implementing Bryan's proposal are included, the total would exceed \$ 193,000.00, not including: sales taxes and freight or shipping charges; the cost of replacing any equipment on hand that he proposes to use, the availability ow which he has

failed to demonstrate; legal and engineering prosecution costs; or the cost of meeting any shortfall in the proceeds of the sale of WSMG. Accordingly, even if Bryan had met the Commission's documentation requirements, his available funds would be insufficient to meet his actual costs of implementing his proposal. Accordingly, Bryan was not financially qualified when he so certified and, thus, he cannot be found to be financially qualified, currently.

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REPLY TO
PROPOSED FINDINGS OF DARRELL BRYAN ON FINANCIAL ISSUES

SBH Properties, Inc. ("SBH") by counsel herewith submits its Reply to the "Proposed Findings of Darrell Bryan on Financial Issues," filed by Darrell Bryan (Bryan") on October 3, 1994, as follows:

I. Bryan's Proposed Findings.

1. Bryan's Proposed Findings are unsupported by the record in many respects and/or fail to consider other relevant record evidence which fails to support Bryan's position.

2. Bryan indicates (at para. 7) that he relied on the Broadcast Supply West ("BSW") catalog for prices for the Gentner remote control, audio console, distribution amp, equipment rack, audio processor and the STL transmission line. ¹/ With the

1. Bryan contends (para. 6) that "the other catalogs reflected similar prices;" however, he has never identified any other catalogs. (Bryan Ex. 8, p. 1; SBH Ex. 6, pp. 3, 21-22)

exception of the automation system, he relied upon information obtained orally from Hall Electronics for the rest of the equipment he proposed to purchase. (Bryan Ex. 8, p. 1; SBH Ex. 6, pp. 3, 21-22) However, Bryan offered no evidence at hearing based on any price quotations from Hall Electronics.

3. Bryan states (at Note 1) that the price he budgeted for his main transmission line (\$ 450) was erroneous and should have been \$ 3,450.00. However his testimony indicated that a number had been dropped and, thus, the price could have been \$ 3,450 to \$ 4,500. (Tr. 78-79) The actual cost of this item was \$ 4,541.60. (Bryan Ex. 9, p. 11) While Bryan claims (at para. 23) that 7/8 inch line is sufficient for his main transmission line, given his admission that he intended to budget \$ 3,450 to \$ 4,500 for this item, it is readily apparent that his proposal contemplated the use of 1-5/8" line, inasmuch as 7/8" line would have only cost \$ 2,111.00. (Bryan Ex. 9, p. 13). Furthermore, Bryan's engineer, Garrett Lysiak, specified 1-5/8 line and his Engineering Statement constitutes the only record evidence regarding the possible combinations of transmitter output power/antenna/transmission line efficiency capable of achieving the 6.0 kilowatt effective radiated power, proposed by Bryan. (SBH Ex. 9, p. 2)

4. Bryan indicates (at para. 8) that he inadvertently omitted the price for an FM modulation monitor. He also acknowledged that he inadvertently omitted an RF Amplifier and a second parareflector antenna. (SBH Ex. 6, pp. 6, 22-23) He also

failed to budget for any monitoring speakers for his studio or for the cost of purchasing any connectors for his STL system or any mounting or grounding hardware for his main or STL transmission lines. (Tr. 147-48)

5. Bryan claims (at para. 9) that he "incorporated a price for a six kilowatt transmitter." However, there is no evidence, whatsoever, that the transmitter Hall Electronics purportedly quoted at a price of \$ 16,000.00 was a 6.0 kilowatt transmitter nor that a 6.0 kilowatt transmitter could have been purchased for such a price and Bryan cites no record support for this contention. While Bryan is correct (at para. 9) that "the record shows that a 6.0 kilowatt transmitter will work with either a 4-bay or 6-bay antenna," it also reflects that Henry makes a 3.0 kilowatt transmitter, which would have been sufficient for use with the 6-bay antenna that Hall purportedly quoted Bryan in 1991. (SBH Ex. 9, p. 2; Tr. 125)

6. Bryan indicates (at para. 10) that the 5 kw Kubota generator was "not in use." However, the record reflects that this generator is specifically listed among the assets of WSMG on the Financing Statement and that Bryan uses the generator for the studio building. (SBH Ex. 10; Tr. 97) (See also: SBH's Proposed Findings at paras. 14, 79) Likewise, Bryan indicates (at para. 10) that "he had unused tables, desks, chairs and typewriters that could be used at the FM station." However, the Financing Statement includes a good deal of office furniture, as well as reference to "miscellaneous office items," and Bryan

acknowledged that these items are located in the WSMG studio building. (SBH Ex. 10, p. 2; Tr. 46) (See also: SBH's Proposed Findings at paras. 15, 79) Furthermore, Bryan claims (at para. 11) that he "already extra telephone equipment at the AM station." However, given his admission that this equipment is currently being used in the operation of WSMG, this "extra" equipment would also be subject to the Bank's security interest and would be sold with WSMG prior to commencement of operation of the FM. (SBH Ex. 7, pp. 13-14; Tr. 87) (See also: SBH's Proposed Findings at paras. 17, 79)

7. Bryan claims (at para. 10) that he believed that extra furniture would not be subject to the Bank's lien, because he had purchased it personally and had not used it in the operation of WSMG and that, if he did use it for the FM it would "fall under the bank's new lien" and "thus, the current bank lien will have no impact on the use of any extra equipment or furniture." This claim is erroneous for several reasons. Initially, Bryan's unsupported claims that he purchased these items personally and has not used them in the operation of WSMG may not be credited, inasmuch as the record reflects that as many as half the checks written to pay Bryan's prosecution costs have been written on the accounts of Burley Broadcasters, Inc. and have been treated as business expenses of the corporation, undermining any possibility that Bryan's personal expenditures could reliably be distinguished from those of the corporation. (Tr. 76-77) (See: SBH's Proposed Findings at paras. 19, 79) Secondly, the fact

that the Bank would have a lien on all assets of the FM does not obviate that fact that Bryan had no basis for assuming that any assets pledged to the Bank to secure the loan on WSMG would be available for use in the FM station, as opposed to being sold with the AM. Finally, Mr. Puckett's July 1, 1994 testimony reflects only that the Bank would not impose any objection to the sale of WSMG, not that the Bank would permit Bryan to retain assets of WSMG for use in the FM. (Bryan Ex. 6, p. 1) On the contrary it would appear that the Bank was under the impression that the proposed loan for the FM would be sufficient to purchase all equipment and furnishings needed for the FM. Id.

8. Bryan asserts (at para. 11) that "electric power that might be needed at the site during construction would most likely be provided by the installer's own generator and power needed for equipment testing would be of short duration." However, Bryan's testimony regarding the use of a generator referred only to Mr. Stone's installation of the tower, not to the installation of equipment and, even then, Bryan did not indicate any certainty with respect to whether or not Stone had a generator, much less whether or not he intended to use it in lieu of requiring Bryan to supply any needed power. (Tr. 81) Nothing in Stone's testimony suggests anything of the sort. (Bryan Ex. 7) Furthermore, Bryan admitted that electric service would be required during the construction and testing of the station and confirmed at hearing that he certainly would have to have power at the transmitter site by time he was ready to install the

transmission equipment. (SBH Ex. 6, pp. 9, 24; Tr. 81) (See: SBH's Proposed Findings at paras. 25, 73)

9. Bryan claims (at para. 11) that he budgeted for telephone service based on what he was currently paying and that he would not receive a bill for these services within the first thirty days. This contention is belied by the fact that Bryan did include \$ 50.00 for telephone service for the first month. (SBH Ex. 15, p. 2) (See: SBH's Proposed Findings at paras. 26, 74)

10. Bryan indicates (at para. 11) that in estimating his initial operating costs he "included site purchase payments." However, the record does not reflect that Bryan had the option of purchasing his proposed transmitter site over time by making monthly payments. On the contrary, all he held was an option to purchase the site for a cash price of \$ 7,000. (SBH Ex. 11) The fact that he subsequently purchased the site is irrelevant, inasmuch as Bryan acknowledged at hearing that at the time he certified and filed his Application, all he had was an option to purchase the site for \$ 7,000.00. (Tr. 50-15) Accordingly, while the \$ 225.00 per month he budgeted for the first three months for "tower site purchase" would have been unnecessary, Bryan omitted the \$ 7,000.00 cost of purchasing the site. (See: SBH's Proposed Findings at paras. 21, 120)

11. Bryan claims (at para. 11) that "he also will not have office rent payments by locating the studio at the building he owns", but the record provides no evidence, whatsoever, that Bryan does not intend to have the FM station pay him rent for the

use of his studio building. ²/ On the contrary, it may reasonably be inferred from the fact that he budgeted to pay rent for the studio that he intended the station to pay him rent for its use.

12. In an attempt to suggest that he did not underestimate his costs for debt service during the first three months, Bryan claims (at para. 11) that he had the option of paying interest only. However, the Bank's December 12, 1991 letter, which was the only documentation he had in his possession at the time he certified and filed his Application, makes no reference to any moratorium on repayment or any moratorium on the payment of interest. (SBH Ex. 6, p. 18) Accordingly, Bryan underestimated his initial operating costs by failing to include debt service for the first month of operation, as well as for the 60-90 day construction period. (Tr. 79-80) (See: SBH's Proposed Findings at para. 24) As reflected in SBH's Proposed Findings (at para. 72) Bryan's failure to include debt service for these additional four months resulted in an underestimation of his costs by \$ 7,737.76. The record demonstrates that he also omitted several other cost items, resulting in an understatement of his total initial operating costs by \$ 8,712.76, not including the costs of installing telephone and electric service. (See: SBH's Proposed Findings at paras. 71-74, 123)

2. The cited hearing testimony (Tr. 97) indicates only that the FM station will utilize the WSMG studio building, which Bryan owns.

13. Bryan asserts (at para. 12) that he has paid all legal and engineering expenses incurred up to July 6, 1994. However, the record reflects that: (a) Bryan included the legal and engineering costs to be incurred in the prosecution of his application as a part of his \$ 175,000.00 estimate of his total costs of construction and initial operation (SHB Ex. 6, pp. 9, 24); (b) he budgeted only "a portion of" \$ 38,517.12 to cover legal and engineering prosecution costs (SHB Ex. 6, pp. 9, 24); and (c) that as of July 6, 1994, he had incurred over \$ 40,000.00 in legal and engineering prosecution costs. (Tr. 77)

14. Bryan claims (at para. 12) that he provided the Bank with a copy of his budget and a pro forma financial statement. The record reflects that the Bank "possibly" reviewed the pro forma, but does not support any finding that Bank was provided with or reviewed Bryan's budget. (Bryan Exs. 6 and 8; Tr. 51-52)

15. Bryan indicates (at para. 13) that the Greene County Bank had already extended a \$ 300,000.00 loan to him when he purchased WSMG in 1989. Actually, the loan was made to Burley Broadcasters, Inc., the licensee of WSMG, and the amount loaned for the purchase was almost three times the value that Bryan placed on the corporation's assets in September, 1991. (SBH Ex. 13)

16. Bryan claims (at para. 14) that Mr. Puckett informed him that payments on the loan would be made "quarterly." This is untrue. It was Bryan who claimed the repayment was to be based on quarterly payments, while Puckett testified that monthly payments would be required. (Bryan Ex. 6, p. 1; Bryan Ex. 8, p. 3) The

confusion apparently resulted from the fact that both the Bank's December 12, 1991 and September 9, 1993 letters are silent as to the terms of the repayment of the loan. (SBH Ex. 6, pp. 18, 20) (See: SBH's Proposed Findings at paras. 60, 87-88)

17. Bryan asserts (at para. 14) that Mr. Puckett informed him that "any decision to incorporate the station would trigger a requirement of pledge of stock." However, the record reflects that at the time of his discussions with Puckett in December, 1991, Bryan thought he would be filing as a corporation, which he believes led to the inclusion of the requirement for a stock pledge. (SBH Ex. 6, p. 24) ³/ The record further reflects that he never advised the Bank otherwise until September, 1993, at which time he approached the Bank to clarify that no stock pledge would be required. (SBH Ex. 6, p. 25; Tr. 75-76) Bryan notes (at para. 14) that Mr. Puckett provided him with a letter in September, 1993, "clarifying that the pledge of stock would only be required in the event of incorporation." However, had this collateral requirement been understood clearly from the outset, as Bryan now attempts to suggest, there would have been no need for any clarification. The December 12, 1991 letter is silent

3. Mr. Puckett testified on June 13, 1994 that he had no recollection of what Bryan's plans were in 1991 regarding incorporation, but believed that the reference to the pledge of stock "refers to stock in the station." (SBH Ex. 7, p. 25) Thus, given his acknowledged lack of recollection, it must be concluded that his July 1, 1994 testimony that the referenced language was included to "trigger" a requirement, in the event of incorporation (Bryan Ex. 6, p. 2), is based upon speculation, not any specific recollection of his intentions in 1991.

with respect to any understanding that the stock pledge was intended to be optional or conditional in any respect. (SBH Ex. 6, p. 18) (See also: SBH's Proposed Findings at paras. 61-62, 89)

18. Bryan points (at para. 14) to Mr. Puckett's testimony that the Bank would not bar any sale of WSMG, based on its lien on the assets of the station. However, Bryan had not had any discussions with or obtained any assurances from the Bank in that regard as of January 12, 1994, the date of his initial deposition in this proceeding, during which the issue of the impact of the Bank's lien on the proposed sale of WSMG was first raised. (Tr. 72) (See also: SBH's Proposed Findings at paras. 63-64, 92-96)

19. Bryan argues (at para. 15) that he valued WSMG at \$ 500,000 in 1991 and at \$ 540,000.00 in 1994 and that the sale of the station for less than half his current valuation "would provide sufficient funds to completely retire the AM station loan." This argument is specious and unpersuasive for a number of reasons. While it is true that Bryan valued the stock of Burley Broadcasters, Inc. at \$ 500,000.00 on his 1991 Personal Financial Statement, the outstanding balance due on the loan at that time was \$ 296,000.00. (SBH Ex. 12) Furthermore, while Bryan included a \$ 500,000.00 value for the stock of Burley Broadcasters, Inc. on his 1991 Personal Financial Statement, the Statement of Assets and Liabilities for Burley Broadcasters, Inc., prepared the same year, reported that the value of all of the assets of the corporation, including accounts receivable and good will, totalled only \$ 135,556.90. (SBH Ex. 13) Even that

valuation may have been significantly inflated, however, inasmuch as the Tangible Personal Property Schedule that Burley Broadcasters, Inc. filed with the State of Tennessee in 1993, reported that the cost of all tangible assets purchased prior to 1993 totalled only \$ 28,797.00 (excluding vehicles) (SBH Ex. 13), while the Statement of Assets and Liabilities reflects that the cost/basis (prior to depreciation) of all tangible assets of the corporation totalled \$ 103,219.00 (excluding vehicles). ⁴/ (See also: SBH's Proposed Findings at paras. 52-57)

20. Accordingly, not only is Bryan's argument unpersuasive, it highlights the utter lack of credibility of his \$ 500,000 to \$ 540,000.00 valuation, which was not premised upon any formal appraisal. (SBH Ex. 7, p. 10; Tr. 58). Even assuming the validity of the \$ 135,556.90 valuation contained in the Statement of Assets and Liabilities and assuming further that the station could be sold for the full value of its assets, the proceeds of such a sale would provide only approximately one third of the funds needed to retire the AM station loan, as it stood at the time Bryan certified and filed his Application. Yet, the December 12, 1991 letter from the Greene County Bank was silent with respect to the proposed sale of the AM, much less with regard to any understanding that the station could be sold for less than was currently owed the bank and any resulting shortfall "folded into" the FM loan. (SBH Ex. 6, p. 18) This comes as no surprise,

4. These assets included: Transmitter Equipment (\$ 49,776), Transmitter Building (\$ 6,500), Studio Equipment (\$ 26,206), and Office Equipment (\$ 20,737).

given the fact that this matter was never discussed with the Bank until subsequent to January 12, 1994. (Tr. 72) (See also: SBH's Proposed Findings at paras. 63-65, 92-97)

21. Bryan argues (at para. 16) that the equipment Mertz included in his Updated Estimate was "of equivalent type, but from a different manufacturer." However, equipment which is acquired from a different manufacturer at a substantially lower price can hardly be termed "equivalent." More significantly, the equipment substituted by Mertz is not the equipment Bryan proposed and no evidence has been offered explaining why Mertz was unable to provide prices for the equipment that Bryan had proposed. SBH demonstrated that prices for the equipment proposed by Bryan was readily obtainable. (SBH Ex. 5) (See also: SBH's Proposed Findings at paras. 102-107, 109-111)

22. Bryan claims (at para. 18) that his Application "contains no proposal for a 2-bay antenna" and that the antenna sketch contained in his Application is "only a visual graphic." However, Mertz acknowledged that his comment was intended only to convey that there is no requirement that the antenna sketch show the number of bays. (Tr. 122) It does not follow from the fact that the number of bays need not be depicted that an applicant may not elect to depict on its antenna sketch the number of bays proposed. Bryan's engineer, Garrett G. Lysiak, who prepared it, acknowledged that the Exhibit E-2 of the Application depicted a 2-bay antenna. (SBH Ex. 9, p. 1) Bryan asserts (at para. 18) that Mertz testified that he would not propose a 2-bay antenna, but Mertz was not Bryan's engineer and did not prepare his

Application, Mr. Lysiak did.

23. Bryan states (at para. 19) that a 6.0 transmitter/exciter would cost \$ 19,200; however, Bryan ignores the fact that Mertz testified at hearing that he had made an error in this respect and that this figure should be increased by \$ 3,000, for a total of \$ 22,200 for the transmitter/exciter. (Tr. 144-45)

24. Bryan contends (at para. 21) that Stone has been involved in tower installation for the past 34 years. This claim is deceiving. The record reflects that Stone installed some towers in 1960, including one 200' tower, while employed by Reisenweaver Communications. (Bryan Ex. 7) He was not involved again in tower installation until 1978, when he became employed by American Aviation, Inc. Id. Since that time he has installed 30' to 150' towers in the context of installing navigation systems for airports; most of these towers are 50-60 feet in height. (Bryan Ex. 7; SBH Ex. 8, p. 13) However, American Aviation, Inc. has never installed a tower over 150' and has never installed a tower for a broadcast station. (Bryan Ex. 7, p. 2; SBH Ex. 8, p. 14) (See: SBH's Proposed Findings at paras. 30)

25. Bryan acknowledges (at para. 22) that Mr. Stone indicated the possibility that a Rohn 55G might be more appropriate for this installation. In fact, the record reflects that Stone did not feel competent to determine whether the Rohn 55G might be more appropriate for this installation, a question which Stone intended having resolved by the Rohn representative. (Bryan Ex. 7, p. 3) Furthermore, the record reflects: (a) that 300 feet is the maximum recommended height for the Rohn 45G and,

were the applicable wind speed increased to 90 mph, the 45G would be recommened for installations to only 240 feet; (b) that Bryan's proposed tower site is located adjacent to the Great Smokey Mountains in a special wind region; and (c) that, while a 70 mph basic wind speed would apply to the rest of the State of Tennessee, abnormal wind speeds would be anticipated within the "special wind region." (See: SHB's Proposed Findings and Conclusions, at paras. 31-33, 112-117)

26. Bryan contends (at para. 22) that Stone quoted a price of \$ 3,800 for the transmitter building. Bryan ignores, however, the critical fact that he did not obtain any quote from Stone until 1994 and that the one he obtained from a local contractor in 1992 was for \$ 5,000.00. (Bryan Ex. 8, p. 2) It was this quote, obtained in 1994, that he was required to have sufficient funds to meet at the time he certified and filed his Application. (See: SHB's Proposed Findings and Conclusions, at para. 118)

27. Bryan indicates (at para. 22) that he "testified that the use of telephone lines is an antervative to microwave STL." However, what Bryan stated at hearing was that he could use telephone lines "if I have to", in the event his proposal to utilize a site he currently owns as an intermediate receive/transmit point for his STL was insufficient to solve any line of sight problem. (Tr. 101) More important than what Bryan stated at hearing, however, is what he proposed in 1992, when he certified and filed his application. Both the Itemization of Costs (SBH Ex. 15) he prepared and his testimony (as well as that of Mertz) supports the conclusion that he proposed to utilize a

microwave STL system, because he budgeted for microwave STL equipment, not for the use of phone lines. (Bryan Ex. 8, p. 1; Bryan Ex. 9, pp. 11; Tr. 99) It is simply because he now realizes that he underestimated the cost of microwave equipment, due to his failure to investigate the line of sight issue, that Bryan now seeks to divert attention from his original proposal to the cost of implementing a proposal he never previously advanced. (See: SBH's Proposed Findings at paras. 46-48, 121)

II. Bryan's Proposed Conclusions.

28. Bryan's Conclusions are unsupported by the facts and ignore significant record evidence, as well as the Commission's documentation requirements for establishing financial qualifications, which are applicable to all post-June, 1989 applicants, including Bryan.

29. Bryan states (at para. 30) that "in order to test Bryan's financial qualifications at the time he certified it is also necessary to determine whether Bryan engaged in serious and reasonable efforts to ascertain and operation costs prior to filing." While this proposition is sound, the record compels the conclusion that Bryan has failed the test. (See: SBH's Proposed Findings, at paras. 66-80) Bryan claims (at para. 36) that the process he utilized was reasonable. However, the reasonableness of the process is best determined by the results it produced, which, here, included omitted costs, understated costs and reliance upon equipment on hand, but of uncertain availability.

30. The record establishes that Bryan obtained prices orally from Hall and relied upon certain BSW catalog prices, to which he

applied a 20-30% "package" discount, even though he did not propose to purchase a "package" of equipment (nor even a majority of the items he proposed to purchase) from BSW. (Bryan Ex. 8, p. 1; SBH Ex. 6, pp. 3, 21-22) Bryan acknowledged that either company would have provided him with a written price quotation for every item he was interested in, had he requested a written quote. (Tr. 32) He simply did not bother. ⁵/

31. Bryan claims (at para. 31) that he included a price for a six bay antenna, because he was unsure of the number of bays he would ultimately need, even though his own engineer indicated that no more than 4 bays could be employed. (SBH Ex. 9, p. 1) This was hardly a reasonable approach. Furthermore, Bryan's argument ignores the fact that specifying a 6 bay antenna permitted him to specify a less powerful and, thus, less expensive transmitter than would be required to provide sufficient output power for the 2-4 bay antenna he would ultimately be required to install, given the constraints of his own technical proposal. (SBH Ex. 9, pp. 1-2) (See: SBH's Proposed Findings at paras. 9-11, 78)

32. Bryan acknowledges (at para. 31) that he relied on orally obtained prices for used equipment, even though he had no agreement with any supplier to assure him of the availability of

5. Bryan did not even obtain price quotations from equipment suppliers to support his case at hearing; even the prices reflected in Mertz' Updated Estimate are taken directly from catalogs. (Bryan Ex. 9, pp. 11-12)

such used items and certainly not at those particular prices. (See: SBH's Proposed Findings at paras. 8, 76-77) Likewise, he did not budget for any vehicles, a second emergency generator or phone equipment and budgeted only \$ 500.00 for office furniture, based on his assumption that he could make use of equipment and furnishings that he had on hand, despite the existence of the Bank's security interest in all assets used in the operation of or purchased with revenues from WSMG. (See: SBH's Proposed Findings at paras. 15, 79)

33. With regard to his omission of electric service costs for the construction period and first month of operation, Bryan contends (at para. 34) simply that these costs would be "minor." However, Bryan offered no evidence to support this contention, which is hardly self-evident, and, more importantly, he failed to budget even for these "minor" costs.

34. Bryan glibly states (at para. 34) that the \$ 225.00 per month that he budgeted for site purchase are no longer necessary. However, Bryan had no option to purchase his proposed site over time and failed to budget the \$ 7,000.00 which would have had to have been paid to acquire the site, a pre-operational cost. (See: SBH's Proposed Findings at paras. 21, 120) Likewise, Bryan's claim (at para. 34) that the funds he budgeted to pay office rent are no longer necessary is entirely unsupported by the record. (See para. 11, supra.)

35. Bryan claims (at para. 34) that he did not "anticipate" having to commence repayment of the loan until 30 days following

commencement of operations. However, as has been demonstrated, Bryan had no basis for this assumption. The only documentation he had in his possession at the time he certified and filed his application failed to include repayment terms, as did the Bank's subsequent September 9, 1993 letter. Indeed, even Puckett's July 1, 1994 testimony failed to indicate that there would be any moratorium on repayment of the loan. (See: SBH's Proposed Findings at paras. 86-88)

36. Seeking to direct attention from his understated costs, Bryan asserts (at para. 34) that the amount he budgeted for initial operation exceeded the amount SBH allocated for initial operating costs. However, this is entirely irrelevant. Bryan advanced no challenge to SBH's financial qualifications and, more importantly, there is no evidence that the proposals of Bryan and SBH are similar, much less identical. While Bryan argues (at para. 35) that the Commission does not require that an applicant's estimated costs be "accurate to the penny," this is merely a straw argument, inasmuch as the record compels the conclusion that the inaccuracy of Bryan's estimate is measured in tens of thousands of dollars. Accordingly, it must be concluded that Bryan's construction and initial operation costs were not reasonably or reliably determined and are significantly understated.

37. Bryan argues (at para. 15) that because legal and engineering fees have been paid on an ongoing basis, the full amount of the loan is available to meet his other construction

and initial operating costs. However, while this argument may impact the issue of Bryan's current qualifications, the subsequent payment of legal and engineering costs has no impact, whatsoever, with regard to Bryan's financial qualifications at the time he certified and filed his application. Bryan has admitted that in certifying his financial qualifications, he included the legal and engineering costs of prosecuting his Application in the \$ 175,000.00 total cost reported in response to Section III, Item 2 of his Application. (SBH Ex. 6, pp. 9, 24) Accordingly, he was required to demonstrate the availability of sufficient funds to meet those costs, as well as the equipment and operating costs, which were included in that total. ⁶ / (See: SBH's Proposed Findings at para. 23) Furthermore, as reflected in SBH's Proposed Findings and Conclusions (at para. 124), even if the full amount of the loan is presently available to meet Bryan's other costs, those other costs exceed \$ 175,000.00, without even considering legal and engineering costs.

38. Bryan contends (at para. 33) that Mertz' "unrebutted" testimony establishes "that the station can be built within the Bryan budget." However, the record confirms that, while Mertz'

6. While the Commission does not require inclusion of prosecution costs in the total reported in response to Section III, Item 2 of FCC Form 301 and permits applicants to pay prosecution costs on an ongoing basis without detracting from their financial qualifications, where, as here, an applicant elects to include prosecution costs in its total cost estimate in response to Section III, Item 2 of FCC Form 301, it is obligated to demonstrate (in response to Item 3) the availability of sufficient funds to meet all such costs so included.

testimony establishes that a hypothetical 6.0 kilowatt FM station could be constructed for \$ 104,051.97 (assuming a 10% discount on equipment purchases and the validity of Items 23-26), his testimony fails to establish that Bryan's proposal could be constructed for that sum or that Bryan has sufficient funds to meet all of his costs of construction and operation in any event. In this regard, Mertz' Updated Estimate is based on the substitution of a number of different and less expensive items of equipment for those proposed by Bryan. Likewise, Mertz' testimony does not address deficiencies in Bryan's estimated initial operating costs, the cost of purchasing his proposed transmitter site, or the reliability of the cost figures included at Items 23-26 of his Updated Estimate, which were supplied by Bryan or Mr. Stone. Furthermore, Mertz Updated Estimate did not include the cost of an intermediate receive/transmit point for the microwave STL system, Bryan proposed, the legal and engineering costs which Bryan included in his total estimate or the cost of meeting any shortfall in the sale of WSMG. (See: SBH's Proposed Findings at paras. 102-125) 124)

39. Bryan contends (at para. 33) that the record establishes that "the proposed Bryan station can be built today using all new equipment for a cost ranging from only 3.28% to 5.35% over Bryan's 1991 estimate." This is untrue. As indicated above, Mertz testimony fails to demonstrate what it would cost to construct the station that Bryan proposed. Furthermore, as set forth below, Bryan's understatement of his costs for a number of items far

exceeded 5.35%:

	<u>Budgeted</u>	<u>Actual Cost</u>	<u>Percent Understated</u>
Transmitter/Exciter	\$ 16,000	\$ 22,200*#	28%
Antenna	4,500	5,900*	24%
Trans. Line	450	4,541*	90%
Connectors	100	560*	82%
Orban Optimod	3,500	5,900**	40%
Moseley STL Package	5,500	8,250**	33%
Scala Parareflectors	500	1,200**	58%
STL Trans. Line	200	500*	60%
	<hr/>	<hr/>	
	\$ 30,750	\$ 49,010	

Source of Cost:

* Bryan Ex. 9, p. 11

** SBH Ex. 5, pp. 9, 12, 25

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Thus, with regard to the foregoing items, Bryan understated his costs by between 24% and 90%. This does not include any of those equipment items which Bryan omitted entirely. (See: SBH Proposed Findings, at paras. 120-24)

40. Bryan claims (at para. 34) that he "added a surplus of appoximately \$ 38,000.00" to his total construction and operating costs. The record does not support such a conclusion. Initially, inasmuch as Bryan certified that his total estimated costs of construction and initial operation, as well as his available funds, both equalled precisely \$ 175,000.00, he had no surplus of